

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Shawna Shields, on behalf of herself)
and all others similarly situated,)
Plaintiff,)
vs.)
Sonora Quest Laboratories, LLC, et al.,)
Defendants.)

No. CV-15-00723-PHX-SPL
ORDER

Before the Court is Plaintiff's Motion for Class Certification (Doc. 71), and Defendants' motions for summary judgment (Docs. 120, 123.) For the reasons that follow, the motions for summary judgment will be granted and the motion for class certification will be denied.

I. Background

On April 21, 2015, Plaintiff Shawna Shields brought this action, on behalf of herself and all other similarly situated, against Defendants Sonora Quest Laboratories, LLC (“Sonora Quest”) and RSI Enterprises, Inc. (“RSI”) (collectively, “Defendants”) for violating 47 U.S.C. § 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act (“TCPA”). Plaintiff alleges that RSI, on behalf of Sonora Quest, improperly called her cell phone number using an automated system or artificial or prerecorded voice to make collection calls.

The factual background in this action is complicated by records from Plaintiff's previous providers and previous blood draws, but the information is necessary because

1 Plaintiff alleges that Sonora Quest obtained her phone number from one of those previous
 2 encounters. (Doc. 128 at 3.) Nevertheless, the motions for summary judgment are limited
 3 to the blood draw that occurred on July 2, 2013. (Doc. 1 ¶ 13.)¹ At issue is whether
 4 Plaintiff provided prior express consent to Sonora Quest to receive debt-collection calls
 5 to her cell phone regarding her blood draw on July 2. There are a limited number of ways
 6 that Sonora Quest could have obtained the information: (1) AFC provided Sonora Quest
 7 the information on or about July 2; (2) Sonora Quest obtained the information from
 8 Plaintiff directly on July 2; or (3) Sonora Quest obtained the information from its
 9 Care360 database which contains contact information from prior visits to Sonora Quest
 10 labs, including orders from other doctors.²

11 A. Defendants' Standard Operating Procedures³

12 Part of Sonora Quest's business model includes operating independent labs inside
 13 of doctors' offices. (Doc. 95 ¶¶ 2-3.) Lab procedures are performed by in-office
 14 phlebotomists ("IOP"). (Doc. 95 ¶ 2.) AFC provides "manual requisition forms," which
 15 are non-Sonora Quest forms that are filled out by hand by a doctor or staff member.
 16 (Docs. 124 ¶ 9; 125 ¶ 9.) These forms contain the patient's name, date of birth, and the
 17 requested lab tests, but do not contain any of the patient's demographic information, such
 18 as addresses or phone numbers. (Id.) After the IOP receives the manual requisition form,
 19 he or she checks Sonora Quest's Care360 system, a proprietary and "independent, stand-
 20 alone database," to see if a previous record for the patient exists. (Docs. 96 ¶ 4; 124 ¶ 13;
 21 125 ¶ 13.) If a previous record exists, the IOP asks the patient to verify the information

22

23 ¹ Plaintiff, or a family member for which Plaintiff was the responsible party, had
 24 five other visits to Sonora Quest that were also not paid and RSI was seeking to collect,
 25 but Plaintiff's Complaint does not mention those other dates. (Doc. 97 ¶ 13.)

26 ² To the extent that there are other possible ways for Sonora Quest to receive
 27 information on a patient, they are not relevant to Plaintiff's encounters with Sonora Quest
 28 on July 2, 2013.

29 ³ The Court recounts Defendants' standard operating procedures as described by
 30 Defendants and attested to by declarations. Plaintiff disputes most of the procedures.
 31 Those disputes will be more thoroughly addressed in the Analysis section, *infra*.

1 contained in the record. (Doc. 95 ¶ 14.) If a previous record does not exist, the IOP must
 2 manually enter the information.⁴ (Doc. 95 ¶ 15.) As the manual requisition form contains
 3 only the patient's name and date of birth, the IOP must obtain the address and phone
 4 number from the patient. (Id.) After creating a new requisition form, by either accessing a
 5 patient's previous record or creating a new record, the IOP prints the Care360 form and
 6 confirms the accuracy of the information with the patient. (Docs. 95 ¶ 18.)

7 When a patient does not pay his or her bill, Sonora Quest contracts with RSI to
 8 assist in debt-collection matters. (Docs. 124 ¶ 30; 125 ¶ 30.) Sonora Quest provides RSI
 9 with account information for the patient, including an address and telephone number.
 10 (Docs. 124 ¶ 33; 125 ¶ 33.) RSI then initiates its two-stage collection process,
 11 precollection and collection, which includes letters, automated phone calls, and calls
 12 made by live persons. (Docs. 121 ¶¶ 2-3; 126 ¶¶ 2a, 3d.) If the information provided by
 13 Sonora Quest proves to be inaccurate or out of date, RSI searches public databases.
 14 (Docs. 121 ¶ 1; 126 ¶ 1e.) However, that was not an issue here.

15 **B. Factual Background**

16 Some background on Plaintiff's previous healthcare provider, Focus on Women
 17 ("FOW") is necessary because FOW also utilized a Sonora Quest IOP who used the
 18 Care360 system. On March 30, 2009, Plaintiff acknowledged that she received FOW's
 19 privacy notice. (Doc. 94-1 at 45-52.) She also filled out the Patient Information form.
 20 (Doc. 102-1 at 77.) Plaintiff provided a phone number of -1255 and an address on
 21 Caminodeoro. (Doc. 102-1 at 77.) Her doctor ordered lab tests and a pap smear. (Doc.
 22 102-1 at 76.) FOW handles lab tests and pap smears differently. Pap smears are not
 23 handled by the FOW IOP and do not get entered into the Care360 system. (Doc. 96 ¶ 21.)
 24 The manual requisition form for her lab work did not have Plaintiff's cell phone
 25 information on it. (Doc. 102-1 at 76.) The Care360 form for blood work did not contain

26
 27 ⁴ The only people who can enter information into the Care360 system are
 28 phlebotomists and doctors' offices that have enrolled in the system. (Docs. 124 ¶ 14; 125
 ¶ 14.) None of the doctors' offices involved here were enrolled since 2010. (Doc. 96 ¶¶
 18-19.)

1 Plaintiff's phone number. (Doc. 102-1 at 75.)

2 On April 22, 2010, both Plaintiff and a relative of Plaintiff sought treatment from
3 FOW. Plaintiff filled out a Patient Information form for herself. (Doc. 102-1 at 83.) The
4 form listed her house number as 8239 and she listed a phone number of -9547. (Id.) Her
5 doctor ordered a pap smear (Doc. 102-1 at 82), which does not get entered into the
6 Care360 system. Plaintiff also signed a form for her relative, listing the same address and
7 Plaintiff's cell phone number of -0635. (Doc. 102-1 at 56.) The doctor ordered lab tests
8 for the relative. (Doc. 102-1 at 55.) The manual requisition form contained the name and
9 date of birth of the patient, but did not contain any contact information such as an address
10 or phone number. (Id.) The Care360 form identified Plaintiff as the "Responsible Party"
11 and listed a house number of 8239 and phone number of -0635. (Doc. 102-1 at 54.)

12 On June 17, 2010, an FOW practitioner ordered more lab tests for Plaintiff's
13 relative. (Doc. 102-1 at 59.) As before, Plaintiff's name and address were not listed on
14 the manual requisition form. (Id.) Plaintiff was again identified as the "Responsible
15 Party," and her house number of 8239 and phone number of -0635 were listed on the
16 Care360 form. (Doc. 102-1 at 57.) On April 26, 2011, a Care360 form identifies Plaintiff,
17 a house number of 8239, and a phone number of -0635. (Doc. 102-1 at 87.) On October
18 19, 2011, the Care360 form identifies Plaintiff, lists an address on 68th Lane and contains
19 the -0635 number. (Doc. 102-1 at 89.) On May 24, 2013, Plaintiff filled out a Patient
20 Information form and listed her cell phone number. (Doc. 102-1 at 92.) As Plaintiff had
21 recently moved, Plaintiff listed her new house number of 7920. (Id.) Her doctor ordered a
22 pap smear (Doc. 102-1 at 91), which was not entered into the Care360 system and the
23 FOW IOP was not involved. (Doc. 96 ¶ 21.)

24 On or around June 30, 2013, Plaintiff visited Arizona Family Care ("AFC") for the
25 first time. (Docs. 124 ¶ 1; 125 ¶ 1.) She completed and signed AFC's Patient Information
26 form, including her new address of 7920 and cell phone number of -0635. (Docs. 102-1 at
27 30; 124-1 at 9.) The Patient Information form explained that AFC could release the
28 information provided by Plaintiff to any specialist office for not only purposes of medical

1 treatment, but also for administering claims. (Doc. 102-1 at 30.) She also signed a form
 2 that acknowledged receipt of AFC's Notice of Privacy Practice. (Doc. 94-1 at 65.) On
 3 June 30, her doctor directed Plaintiff to have her blood drawn by the Sonora Quest IOP.
 4 (Docs. 124 ¶ 5; 125 ¶ 5.) However, the blood draw required fasting and Plaintiff had not
 5 fasted on that day. (Docs. 124 ¶ 6; 125 ¶ 6.) Plaintiff returned on July 2, 2013 to have the
 6 blood draw performed. (Id.) Phlebotomist Lilly Islas was the regular Sonora Quest IOP
 7 for that location and she was there that day. (Docs. 124 ¶ 7; 125 ¶ 7.) Plaintiff handed
 8 Islas the manual requisition form provided by AFC, which identified the necessary tests
 9 to be performed. (Docs. 124 ¶ 9; 125 ¶ 9.) The form did not contain Plaintiff's cell phone
 10 number. (Docs. 124 ¶ 10; 125 ¶ 10.)

11 Islas verbally confirmed Plaintiff's name and date of birth from the AFC
 12 requisition form and asked Plaintiff for her insurance card. (Docs. 124 ¶ 12; 125 ¶ 12.)
 13 Using this information, Islas accessed the Care360 system to see if Plaintiff was already
 14 in the system. (Docs. 124 ¶ 13; 125 ¶ 13.) Islas, however, inadvertently entered the wrong
 15 birthdate for Plaintiff, and created a new record in the Care360 system rather than
 16 retrieving the existing record. (Docs. 124 ¶¶ 16-17; 125 ¶¶ 16-17.) This required Islas to
 17 manually populate Plaintiff's telephone number, address and insurance information as
 18 provided verbally by Plaintiff. (Docs. 124 ¶ 17; 125 ¶ 17.) Plaintiff testified at her
 19 deposition that Islas never verbally asked her for her address and telephone number.
 20 (Doc. 125-1 at 3.) After reviewing the information with Plaintiff, either Plaintiff or Islas
 21 discovered the mistake and Islas entered Plaintiff's correct birthdate into the Care360
 22 system. (Docs. 124 ¶ 20; 125 ¶ 20.) The Care360 system automatically generated a notice
 23 that specified that "an update or correction has been made to DOB." (Docs. 125-3 at 3;
 24 124 ¶ 25; 125 ¶ 25.) The Care360 system then showed Plaintiff's existing record from lab
 25 tests run from FOW from 2009 and 2010. (Docs. 124 ¶ 21; 125 ¶ 21.)

26 Islas printed out the final Care360 form and gave it to Plaintiff for review. (Docs.
 27 102-1 at 61; 124 ¶ 25; 125 ¶ 25.) Plaintiff verified the accuracy of the information and
 28 signed the form. (Docs. 102-1 at 61; 124-1 at 9.) However, the parties dispute what

1 information Plaintiff verified. (Docs. 124 ¶ 25-26; 125 ¶ 25-26.) Plaintiff argues that she
 2 only verified that the samples were labelled in her presence. However, the form also
 3 states that she is verifying that “the information and spelling is accurate on sample(s) *and*
 4 *requisition.*” (Doc. 125-3 at 3) (emphasis added). Ultimately, Plaintiff did not pay her bill
 5 and her account was referred to RSI for collection. (Doc. 97 ¶ 13.) RSI called Plaintiff on
 6 nine occasions regarding the July 2, 2013 bills, with eight of those calls being initiated by
 7 an automated system. (Doc. 124 ¶ 40.) Plaintiff then initiated this putative class action.
 8 (Doc. 1.)

9 **II. Standing**

10 RSI raises the issue of standing. (Doc. 120 at 8.) Before the Court can reach the
 11 merits of this action, it must first determine whether Plaintiff has standing. *See*
 12 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Thomas v. Mundell*, 572 F.3d
 13 756, 760 (9th Cir. 2009). RSI raises a colorable argument, but, after briefing closed in the
 14 instant case, the Ninth Circuit issued its opinion in *Van Patten v. Vertical Fitness Group,*
 15 *LLC*, --- F.3d ----, 2017 WL 460663, *4 (9th Cir. 2017). The Court “conclu[ded] that a
 16 violation of the TCPA is a concrete, *de facto* injury.” *Id.* Although *Van Patten* addressed
 17 a different provision of the TCPA, 47 U.S.C. § 227(b)(1)(C) rather than 47 U.S.C. §
 18 227(b)(1)(A), the Court’s reasoning appears to apply to the TCPA as a whole. The Court
 19 found that “[t]he TCPA establishes the substantive right to be free from certain types of
 20 phone calls and texts absent consumer consent.” *Id.* Plaintiff makes the same claim here.
 21 As such, Plaintiff has standing.

22 **III. Motions for Summary Judgment**

23 **A. Legal Standard**

24 **1. Summary Judgment**

25 A court must grant summary judgment if the pleadings and supporting documents,
 26 viewed in the light most favorable to the non-moving party, “show[] that there is no
 27 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
 28 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23

1 (1986). A fact is “material” when, under the governing substantive law, it could affect the
 2 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
 3 genuine dispute of material fact arises if “the evidence is such that a reasonable jury
 4 could return a verdict for the nonmoving party.” *Id.*

5 The party seeking summary judgment bears the initial burden of informing the
 6 court of the basis for its motion and identifying those portions of the pleadings,
 7 depositions, answers to interrogatories, and admissions on file, and affidavits, which it
 8 believes demonstrate the absence of any genuine issue of material fact. *Celotex*, 477 U.S.
 9 at 323. The burden then shifts to the party opposing summary judgment, who “must make
 10 a showing sufficient to establish a genuine dispute of material fact regarding the
 11 existence of the essential elements of [her] case that [she] must prove at trial.” *Gorman v.*
 12 *Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009) (citation omitted).

13 **2. TCPA**

14 Congress enacted the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §
 15 227 *et seq.* to address telemarketing calls and practices which Congress found to be an
 16 invasion of consumer privacy. The TCPA prohibits the use of automatic telephone
 17 dialing systems and artificial or prerecorded voices to cell phones unless the call is “made
 18 for emergency purposes or made with the prior express consent of the called party[.]” 47
 19 U.S.C. § 227(b)(1)(A)(iii). A violation occurs when (1) the defendant calls a cellular
 20 telephone number; (2) using an automated telephone dialing system; (3) without the
 21 recipient’s prior express consent. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d
 22 1036, 1043 (9th Cir. 2012). The third element is not part of the plaintiff’s *prima facie*
 23 case, rather it is an affirmative defense because the burden is on the caller to prove
 24 consent. *Van Patten*, 2017 WL 460663 at *5.

25 Congress tasked the FCC with making the necessary rules and regulations to carry
 26 out the provisions of the TCPA. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d
 27 1110, 1117 (11th Cir. 2014). The Ninth Circuit accepts the FCC’s interpretation of “prior
 28

1 express consent.” *Van Patten*, 2017 WL 460663 at *6.⁵ District courts lack the
 2 jurisdiction to review FCC rulings. *Mais*, 768 F.3d at 1119-20.

3 In 1992, the FCC determined that “persons who knowingly release their phone
 4 numbers have in effect given their invitation or permission to be called at the number
 5 which they have given, absent instructions to the contrary.” *In the matter of rules and*
6 regulations implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd.
 7 8752, 8769 (1992) (“1992 Order”). In 2008, the FCC extended this general proposition to
 8 cell phones. *In the matter of rules and regulations implementing the Telephone Consumer*
9 Protection Act of 1991, 23 FCC Rcd. 559, 559 (2008) (“2008 Order”) (the FCC
 10 determined “that autodialed and prerecorded message calls to wireless numbers that are
 11 provided by the called party to a creditor in connection with an existing debt are
 12 permissible as calls made with the ‘prior express consent’ of the called party”).

13 “[P]rior express consent is a complete defense to [a] TCPA claim.” *Van Patten*,
 14 2017 WL 460663 at *5. The TCPA does not direct any specific method by which the
 15 caller must obtain consent. *In the matter of rules and regulations implementing the*
16 Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7990 (2015) (“2015
 17 Order”). “Calls placed by a third party collector on behalf of that creditor are treated as if
 18 the creditor itself placed the call.” *In the matter of GroupMe, Inc.*, 29 FCC Rcd. 3442,
 19 3444 (2014) (“GroupMe”). “[C]onsent to be called at a number in conjunction with a
 20 transaction extends to a wide range of calls ‘regarding’ that transaction, even in at least
 21 some cases where the calls were made by a third party.” *Id.* at 3446. “[A]n effective

22

23 ⁵ To the extent Plaintiff relies on *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d
 24 946, 955 (9th Cir. 2009), for the Ninth Circuit’s definition of “express consent,” the
 25 Court did not discuss or interpret the FCC’s definition of “express consent.” Rather, the
 26 Ninth Circuit relied on Black’s Law Dictionary for its meaning. Earlier this year, the
 27 Ninth Circuit reviewed the FCC’s definition of “express consent” and found it
 28 acceptable. This Court acknowledges that the implied consent as discussed in the FCC
 Rulings is a far cry from the traditional definition of express consent. However, this
 Court is bound by FCC Rulings. Until the FCC reverses its 1992 Order, or a court of
 appeals invalidates it, this Court is required to follow it. *Reardon v. Uber Technologies, Inc.*, 115 F.Supp.3d 1090, 1097 (N.D. Cal. 2015) (collecting cases re: majority of courts
 holding “that a telephone customer who provides her number to another party consents to
 receive calls or texts from that party” “[i]n accordance with the 1992 FCC Order[.]”).

1 consent is one that relates to the same subject matter as is covered by the challenged calls
 2 or text messages.” *Van Patten*, 2017 WL 460663 at *6. Express consent does not mean
 3 that the consumer consented to all contacts for any purpose, but must “relate to the type
 4 of transaction that evoked it.” *Id.*

5 **B. Express Consent in a Medical Setting**

6 The only element at issue here is the affirmative defense of express consent. It is
 7 undisputed that RSI called Plaintiff’s cell phone using an automated system or artificial
 8 or prerecorded message to collect on an unpaid bill for services performed by Sonora
 9 Quest on July 2, 2013. If Plaintiff provided prior express consent, she has no claim.
 10 Defendants argue that they obtained Plaintiff’s express consent, while Plaintiff “firmly
 11 denies” that she “spoke her name and address to the IOP.” (Doc. 128 at 1.)

12 The Ninth Circuit has not directly addressed prior express consent in the context
 13 of a medical setting, but two of its sister circuits have addressed the issue. In *Mais*, a
 14 patient’s wife provided his cell phone number when he was checked into the emergency
 15 room. 768 F.3d at 1110. The patient received radiology services from an independent
 16 contractor within the hospital. *Id.* at 1113. The radiology contractor forwarded the unpaid
 17 bill to a debt collection company, who used automated technology to contact the patient.
 18 *Id.* at 1114. The debt collector called between fifteen and thirty times and left four
 19 messages. *Id.* *Mais* argued, as here, that he did not provide express consent because the
 20 FCC’s 2008 ruling did not apply to medical debt and because his wife provided the
 21 number to the hospital, not the radiology provider. The Eleventh Circuit rejected the
 22 plaintiff’s allegation that the FCC did not include medical creditors, finding that “the
 23 FCC’s general language sends a strong message that it meant to reach a wide range of
 24 creditors and collectors, including those pursuing medical debts.” *Id.* at 1122 (citing 2008
 25 *Order* at 563). *Mais* argued that the ruling applied only to providing a cell phone number
 26 to a creditor on a credit application. *Id.* The Court quickly rejected that argument
 27 explaining that the FCC used the example “illustratively, not exclusively.” *Id.* The Court
 28 reasoned that “[w]hen it comes to expectations for receiving calls, we see no evidence

1 that the FCC drew a meaningful distinction between retail purchasers who complete
 2 credit applications and medical patients who fill out admissions forms... A patient filling
 3 out a form from a healthcare provider may very well expect to be contacted about his
 4 health and treatment. But if the form explicitly states that the provided information will
 5 be used for payment and billing, the patient has the same reason to expect collection calls
 6 as a retail consumer.” *Id.* The Court further rejected *Mais*’s claim that the 2008 *Order*
 7 only applies when the phone number is given directly to the creditor. The Court’s ruling
 8 was confirmed in *GroupMe*, where the FCC permitted consent be given through an
 9 intermediary. *GroupMe* at 3447. The Court found that, by providing his cell phone
 10 number to the hospital, the patient provided prior express consent to the radiology
 11 creditor. *Mais*, 768 F.3d at 1126.

12 The Sixth Circuit also directly addressed prior express consent in the context of
 13 medical debt. *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338 (6th Cir. 2016). The
 14 plaintiffs provided their cell phone numbers to the hospital where they received care. *Id.*
 15 at 340. They both received anesthesiology services while at the hospital. *Id.* The
 16 anesthesiology department, who are consultants, not employees of the hospital, turned the
 17 bills over to a debt collector after not receiving payment. The debt collector received the
 18 phone numbers from the anesthesiology consultants, who received the phone numbers
 19 from the hospital. *Id.* The patients signed Patient Consent and Authorization forms
 20 covering “all medical and surgical care.” *Id.* The Sixth Circuit rejected plaintiffs’
 21 argument that they “needed to provide their cell phone numbers to their creditor,[] which
 22 they did not do.” *Id.* at 344. The Court reasoned that “if one provides a cell phone number
 23 to a health organization seeking medical treatment, and a provider affiliated with that
 24 health organization treats that person for the same ailment, it is normal, expected, and
 25 desired to interpret that provision of the cell phone number as an invitation for an entity
 26 affiliated with that organization to call for something *arising out of* one’s treatment.” *Id.*
 27 at 345-46 (emphasis in original). The Sixth Circuit found “that consumers may give
 28 ‘prior express consent’ under the FCC’s interpretation of the TCPA when they provide a

1 cell phone number to one entity as part of a commercial transaction, which then provides
 2 the number to another related entity from which the consumer incurs a debt that is part
 3 and parcel of the reason they gave the number in the first place.” *Id.* at 346. Of note, the
 4 Sixth Circuit identified the medical care as a “commercial transaction,” placing it firmly
 5 within the control of the FCC.

6 **1. Express Consent to AFC**

7 Turning to the facts here, it is undisputed that Plaintiff visited AFC for the first
 8 time on or around June 30, 2013. (Docs. 124 ¶ 1; 125 ¶ 1.) She completed and signed her
 9 doctor’s Patient Information form, including her house number of 7920 and her cell
 10 phone number of -0635. (Docs. 102-1 at 30; 124-1 at 9.) The Patient Information form
 11 explained that AFC could release the information provided by Plaintiff to any specialist
 12 office “concerning advise, care, treatment, services … unless specifically excluded by me
 13 below, for purposes of medical treatment and evaluating and administering claims. (Doc.
 14 102-1 at 30.)⁶ AFC’s Notice of Privacy Practices (“NPP”) also may provide consent and
 15 Plaintiff acknowledges receiving a copy of AFC’s NPP. (Docs. 94-1 at 32; 102-1 at 32,
 16 65; 124-1 at 8-9.) Here, however, Defendants did not submit a valid NPP from AFC.⁷

17 While Plaintiff does not dispute that she gave her express consent to AFC, she
 18 disputes that AFC could provide Sonora Quest with her information despite the release
 19 she signed. (Doc. 128 at 7.) Plaintiff’s argument that *Mais* and *Baisden* are
 20 distinguishable because they involved hospitals instead of a “family medical practice” is
 21 not persuasive. (Doc. 128 at 8.) She argues that the hospital patients received care from

22 ⁶ The signed form does not include any exclusions, and Plaintiff does not allege that
 23 she made any exclusions. (*Id.*)

24 ⁷ AFC’s NPP is dated September 23, 2013, after the July 2, 2013 laboratory samples
 25 were obtained here. (Doc. 102-1 at 33-43.) Although Norma Anaya declares that she
 26 “understand[s] that [the NPP] was developed and adopted by APP in May of 2013, and
 27 thus was actually in effect as of July 2, 2013[,]” this is insufficient to overcome the
 28 deficiency. (Doc. 124-1 at 20.) The form would not have changed its effective date unless
 some piece of information in the form was updated. While the change could be
 immaterial to the facts here, there is not enough information to know what language was
 contained in the NPP in effect on July 2, 2013. Without more evidence, the NPP provided
 by AFC is inadmissible.

1 doctors practicing at the hospital. (Id.) Neither Circuit intended to limit their rulings to
2 hospitals. The Sixth Circuit's ruling applied to patients seeking care from "health
3 organizations" and "provider[s] affiliated with that health organization." *Baisden*, 813
4 F.3d at 345-46. Similarly, the Eleventh Circuit referred to a "patient filling out a form
5 from a healthcare provider." *Mais*, 768 F.3d at 1122. Tellingly, neither the Ninth Circuit
6 nor its sister circuits have disagreed with *Mais* or *Baisden*. Indeed, the Ninth Circuit cites
7 to *Mais* approvingly on different grounds. *Van Patten*, 2017 WL 460663 at *6. Making
8 *Mais* and *Baisden* even more relevant is that the healthcare providers operated within the
9 hospital's space as contractors. Here, Sonora Quest also operated within Plaintiff's
10 doctor's office as contractors. The primary factor for the circuit courts was whether the
11 care was part of the same transaction, not whether the medical care being performed was
12 in a hospital setting. Here, Plaintiff went to her doctor presumably for some type of
13 symptoms. Her doctor determined that a blood test would help him determine how to
14 treat Plaintiff's complaint. (Doc. 103 at 25.) The blood test required fasting, which
15 Plaintiff had not done that day. (Docs. 124 ¶ 6; 125 ¶ 6.) She came back a couple of days
16 later and got a blood test. (Id.) Plaintiff sought out Sonora Quest to perform the blood
17 test; Sonora Quest did not go looking for Plaintiff. Plaintiff's blood work was clearly part
18 of the same transaction and subject matter as her doctor appointment. See *Van Patten*,
19 2017 WL 460663 at *6.

20 Next, Plaintiff alleges that a phlebotomist is not a specialist, because a
21 phlebotomist is not a doctor. (Doc. 128 at 8.) She claims, therefore, that she did not
22 consent for her information to be sent to Sonora Quest. This Court disagrees.
23 Laboratories are an integral part of the healthcare system. Healthcare today is delivered in
24 many different formats by many different professionals. Nurses, nurse practitioners,
25 physician's assistants, phlebotomists, x-ray technicians, and other professionals regularly
26 provide healthcare to patients. *Mais* involved the services of radiology. Generally, a
27 doctor reads the x-rays or other tests, but the test itself is generally performed by a
28 technical expert that is not a doctor. The *Mais* Court did not distinguish between the

1 radiologist's bill for reading and interpreting the test results and the cost of the test itself.
 2 Here, Plaintiff's doctor ordered lab tests, and sent her to a phlebotomist he provided
 3 space for in his office. It is nonsensical to categorize these lab tests as outside of
 4 Plaintiff's "medical treatment" or assert that the term specialist as used in the consent
 5 form clearly excludes all healthcare professionals that are not doctors.

6 Plaintiff provided prior express consent to her doctor's office. AFC could legally
 7 provide the information to Sonora Quest, a healthcare provider located within its offices.
 8 However, it is not clear that Sonora Quest obtained Plaintiff's telephone number from
 9 AFC. The Court, therefore, must analyze whether Plaintiff gave her phone number to
 10 Sonora Quest directly, thereby providing express consent.

11 **2. Express Consent to Sonora Quest**

12 Sonora Quest alleges that Plaintiff provided her cell phone number directly to its
 13 IOP on July 2, 2013, and, therefore, it has Plaintiff's prior express consent. (Doc. 123 at
 14 3.) Plaintiff vehemently denies that she provided her cell phone number to the IOP. (Doc.
 15 125 ¶¶ 11, 17-19, 24-27.) It is undisputed that Plaintiff visited other Sonora Quest labs
 16 located in other doctors' offices prior to this date and that the Care360 system contained
 17 multiple addresses and phone numbers for Plaintiff.

18 Plaintiff, however, makes a number of conclusory legal statements. First, Plaintiff
 19 cites to the *2008 Order* for the proposition that "prior express consent provided to a
 20 particular creditor will not entitle that creditor (or third party collector) to call a
 21 consumer's wireless number of behalf of other creditors, including on behalf of affiliated
 22 entities." (Doc. 128 at 3 (citing *2008 Order* at n.38).) Plaintiff misunderstands the *2008*
 23 *Order*. It appears Plaintiff reads this citation through the lens of AFC being the creditor,
 24 and Sonora Quest and RSI being affiliated entities. Here, the creditor is Sonora Quest and
 25 the third-party collector is RSI. An "affiliated entity" is one where there is no contractual
 26 relationship between companies, whereas a vendor or contractor is not considered an
 27 affiliated entity. *Baird v. Sabre*, 636 Fed.Appx. 715 n.3 (9th Cir. 2016). As detailed in
 28 *Mais and Baisden*, a phone number provided to a healthcare facility, such as AFC,

1 includes prior express consent to its contractors, such as Sonora Quest.

2 She similarly argues that “[t]he FCC’s order makes clear that the provision of
 3 Plaintiff’s number to her medical care provider does not provide Sonora Quest with prior
 4 express consent.” (Doc. 128 at 2, 5.) Plaintiff mischaracterizes the *2008 Order*.
 5 Essentially, Plaintiff argues that the FCC applies only when a creditor gives his or her
 6 information to a financial institution. (Doc. 128 at 6.) Although Plaintiff acknowledges
 7 the scenario of putting a phone number on a credit application was merely an example by
 8 the FCC, she asserts that these were “the types of interactions that the FCC was
 9 envisioning when it created the rule.” (Doc. 128 at 6.) Plaintiff provides no support for
 10 these arguments, and, instead, urges the Court to require Sonora Quest to produce binding
 11 case law for the proposition that a creditor includes a medical care provider. (Id.) Plaintiff
 12 points to nothing to suggest that *any* circuit limits the application of the FCC to only
 13 financial institutions as creditors. Indeed, the *Mais* Court rejected this argument. *Mais*,
 14 768 F.3d at 1122. Plaintiff also presses the Court to leave it to a jury to decide whether
 15 the *2008 Order* applies to the current circumstances. (Doc. 128 at 6-7.) However, the
 16 clear language of the *2008 Order* and the subsequent rulings and case law make it clear
 17 as a matter of law that creditors are not limited to financial institutions and that the *2008 Order*
 18 does apply to the current circumstances.

19 Next, Plaintiff urges the Court to find “that the FCC’s 2008 order does not
 20 contemplate that the provision of a telephone number in these circumstances as sufficient
 21 to evidence the provision of prior express consent to be called at that number.” (Doc. 128
 22 at 5.) This argument fails as well. The *2008 Order* expressly stated “that autodialed and
 23 prerecorded message calls to wireless numbers that are provided by the called party to a
 24 creditor in connection with an existing debt are permissible as calls made with the ‘prior
 25 express consent’ of the called party.” *2008 Order* at 559. Furthermore, the FCC
 26 specifically contemplated such circumstances. Consent is deemed granted “if the wireless
 27 number was provided by the consumer to the creditor, and that such number was
 28 provided during the transaction that resulted in the debt owed.” *2008 Order* at 564-65.

Plaintiff asserts that, even if Defendants can prove that Plaintiff provided prior express consent pursuant to 47 U.S.C. § 227(b)(1)(A), Defendants must also prove that the FCC created an exception under § 227(b)(2)(C). (Doc. 127 at 9.) Plaintiff provides no support for such a contention. Section 227(b)(2)(C) is inapplicable to the case at bar. Essentially, Section 227(b)(2)(C) allows the FCC, even if a party was in violation of Section 227(b)(1)(A), to make exemptions for calls to cell phones that are not charged to the called party. The caller must be in violation of (b)(1)(A) before (b)(2)(C) can be triggered. It is not an additional requirement. In the same vein, Plaintiff raises the exemption argument in two other filings, but never develops the argument. (*See* Docs. 116 at 7; 128 at 2.) Plaintiff states that “[b]eyond availing itself of the FCC’s 2008 exemption, Defendants are without any basis to argue they possessed ‘prior express consent’ for any class member.” (Doc. 116 at 7.) The *2008 Order*, however, provides no exemptions. The ruling states “that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the ‘prior express consent’ of the called party.” *2008 Order* at 559. This language simply restates 47 U.S.C. § 227(b)(1)(A)(iii)—that a caller may not use automated telephone equipment to a cell phone unless the call is made for an emergency purpose or is “made with the prior express consent of the called party.” This was an extension of the FCC’s *1992 Order* regarding “prior express consent” to cell phones. Plaintiff again raises the issue in response to Sonora Quest’s summary judgment motion. (Doc. 128.) She argues that, even if she provided her number to the IOP, Sonora Quest “must still establish that it is entitled to the exemption in the FCC’s 2008 order on ‘prior express consent.’” (Doc. 128 at 2.) As noted, however, the *2008 Order* does not provide any additional exemptions than those provided by the TCPA. This is a circular argument that takes the Court back to its first statement of the issue: “The only element at issue here is the affirmative defense of express consent.” *Supra*.

Turning to the facts, it is undisputed that, on July 2, 2013, Plaintiff handed phlebotomist Lilly Islas a manual requisition form and that the form did not contain

1 Plaintiff's address or phone number. (Doc. 103-1 at 16.) Islas looked into the Care360
2 system, but did not find an existing record because she accidentally, but fortuitously for
3 Defendants, entered Plaintiff's wrong birthdate. Because Islas created a new record,
4 rather than accessing Plaintiff's previous record, Islas necessarily had to obtain the
5 information from Plaintiff because it was not on the manual requisition form.
6 Additionally, Islas and another Sonora Quest IOP testified that they always verbally
7 obtain addresses and phone numbers from each patient prior to blood draws. (Docs. 88 ¶¶
8 5-6, 10-12; 95 ¶¶ 10, 14-16.) Islas's supervisor also testified that, in the months of June,
9 July, and August 2013, she audited Islas's performance, and each time Islas obtained the
10 proper information from the patient. (Doc. 87 ¶¶ 6-7.) The testimony, backed up by
11 incontrovertible proof in the form of the two Care360 forms printed on the same day
12 (Doc. 103 at 56, 60), shows that Plaintiff must have given Islas her address and phone
13 number.

14 Plaintiff argues that the existence of information in the Care360 system
15 "eliminate[s] any doubt that Sonora Quest obtained her telephone number from within
16 Care360, not from Plaintiff herself." (Doc. 128 at 4.) However, the fact that the Care360
17 system contained some form of her information does nothing to refute the evidence that
18 shows that the IOP made a mistake and did not access the Plaintiff's previous information
19 until after creating a new record. Plaintiff further argues that a "reasonable jury could
20 find her recollection credible[.]" (Doc. 128 at 4.) If this were a situation where two
21 parties remembered the event differently, such would be the case. However, in this
22 instance, it is Plaintiff's lack of recollection versus evidence showing that a mistake was
23 made. Plaintiff's denial that she spoke her address or phone number to Islas does not
24 overcome the sheer weight of the evidence. There is yet more evidence.

25 As acknowledged, Plaintiff's information already existed in the Care360 system,
26 but a closer look at the information in the Care360 system proves that the information
27 could not have automatically populated into the new requisition form. The last Care360
28 form from FOW was created on October 19, 2011. (Doc. 102-1 at 89.) That form listed

1 an address on 68th Lane, a completely different address than is on the July 2, 2013
2 requisition. Plaintiff argues that FOW had her current address because she provided them
3 with the new 7920 address on May 24, 2013. (Doc. 128 at 4.) This argument fails,
4 however, because she did not have any blood work done that day. Pap smears were
5 processed in a different fashion; the FOW IOP was not involved and the Care360 system
6 was not utilized on May 24, 2013. (Doc. 96 ¶ 21.) No reasonable jury could find
7 Plaintiff's recollection credible.

8 Plaintiff also argues that because both Care360 forms have identical timestamps,
9 "a reasonable jury could find it more credible that the Care360 system updated both
10 records at the same time." (Doc. 128 at 5.) Sonora Quest has produced two different
11 Care360 forms. (Doc. 103 at 56, 60.) The following facts prove that Islas entered an
12 incorrect birthdate for Plaintiff and could not have retrieved information already
13 contained in the Care360 system: (1) Islas could not have obtained Plaintiff's prior cell
14 phone record without entering in her correct birthdate; (2) if Islas had entered the correct
15 birthdate, she would have pulled up Plaintiff's existing record and there would be no
16 form listing the wrong birthdate; (3) if Islas entered the correct birthdate, the second form
17 would not have had a message about the updated birthdate because there would be
18 nothing to update; (4) the forms have two different requisition numbers with the lowest
19 invoice number being the form that contained the incorrect birthdate inferring that it was
20 created first; (5) Plaintiff's new address did not previously exist in the Care360 system;
21 and (6) only the second form is signed by Plaintiff. Plaintiff would have the Court believe
22 that Islas simultaneously produced both records, but does not even attempt to explain
23 why Islas would deliberately enter the wrong birthdate to create the simultaneous forms
24 or have any evidence that such a thing is even possible. No reasonable jury could find
25 that identical timestamps somehow disproves the significant amount of evidence
26 provided by Defendants.

27 Plaintiff gave her prior express consent to both AFC and Sonora Quest to receive
28 calls on her cell phone by providing them with a cell phone number directly in relation to

1 appointments at the end of June and beginning of July in 2013. The Court need not reach
 2 whether Plaintiff provided her cell phone number to RSI because RSI was acting as a
 3 third-party collector on behalf of Sonora Quest. As such, it is as if Sonora Quest placed
 4 the phone calls. *See GroupMe* at 3444. Any prior express consent granted to Sonora
 5 Quest applies equally to RSI unless RSI obtained the cell phone number from another
 6 source, which did not happen here. Prior express consent is a complete defense to a
 7 TCPA claim. Plaintiff's claims must be dismissed in their entirety.

8 **IV. Class Certification**

9 **A. Legal Standard**

10 Rule 23 of the Federal Rules of Civil Procedure governs class actions. A member
 11 of a class may sue as a representative party if the member satisfies four prerequisites:
 12 numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P.
 13 23(a). In addition to the prerequisites, the plaintiff must also show that the class falls into
 14 one of three categories. Plaintiff seeks certification under Rule 23(b)(3). (Doc. 71 at 4.)

15 “[P]laintiffs wishing to proceed through a class action must actually *prove*—not
 16 simply plead—that their proposed class satisfies each requirement of Rule 23[.]”
 17 *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). “As this Court
 18 has repeatedly held, a class representative must be part of the class and “possess the same
 19 interest and suffer the same injury” as the class members.” *E. Texas Motor Freight Sys.
 20 Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

21 **B. Analysis**

22 Plaintiff's claims do not succeed and she, therefore, is not a member of the class.
 23 *Id.* The class action fails on that prerequisite alone. But that is not the only reason the
 24 class action must fail. It is unlikely that patients go see a doctor at his or her office, has
 25 lab work ordered by their doctor, and have their blood taken by an IOP without ever
 26 providing their phone number. The fact that some of those phone numbers may be cell
 27 phone numbers is immaterial because the patients have then given their prior express
 28 consent. The rare patient that could allege facts to survive would be so few as to fall far

1 short of the numerosity requirement of Fed. R. Civ. P. 23(a)(1). Accordingly,

2 **IT IS ORDERED:**

- 3 1. That Defendants' motions for summary judgment (Docs. 120, 123) are
4 **granted;**
- 5 2. That Plaintiff's motion for class certification (Doc. 71) is **denied;** and
- 6 3. That the Clerk of Court shall **terminate** this action and enter judgment
7 accordingly.

8 Dated this 29th day of March, 2017.

9 

10 Honorable Steven P. Logan
11 United States District Judge

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